formances being arranged and performed during the relevant periods. Thus bearing in mind the brand of music involved, the uncertainty of acceptance of their recordings and their selling power, it is clearly understandable that quantification of damages is not possible and on balance I had concluded that on the peculiar facts of this case, an interim injunction should issue in the manner asked for by the plaintiffs with the usual undertaking as to damages by the plaintiffs in the event that the defendants should succeed in having it set aside later. Here I need to make it clear that the interim injunction should be until further order as that was not specifically stated by me when making the order.

Order accordingly.

Solicitors: *Shearn Delamore & Co*; *Shafee & Co.*

Reported by *Teo Keang Sood*

Mohammad bin Abdullah & Ors v Fu Lee Development Sdn Bhd

HIGH COURT (JOHORE BAHRU) – CIVIL SUIT NO F37 OF 1983
LC VOHRAH J
21 MAY 1988

Civil Procedure – Garnishment of moneys held by garnishee as stakeholder – Intervention by intervener – Whether debt due from judgment debtor – Rules of High Court 1980, O 49 r 1(1)

This is an application by the intervener against the decision of the senior assistant registrar ordering that certain moneys held by the garnishee as stakeholder remain garnished until further inquiry to satisfy a judgment recovered against the judgment debtor by the judgment creditors.

The sums of moneys available by way of end-financing provided by the intervener for the housing project developed by the judgment debtor were released progressively to the judgment debtor by the intervener on the basis of certificates of completion issued by the architect for the housing project. All payments paid by way of end-financing were channelled to the judgment debtor through the garnishee, a firm of solicitors. The final instalment amounting to 5% of the purchase price was to be retained by the garnishee as stakeholders until the issuance of the certificate of fitness. The judgment creditors' units were completed in 1982 but the certificates of fitness had not been issued by the authorities in respect of these units.

The sole issue for determination in this appeal is whether there is a debt due or accruing due to the judgment debtor from the garnishee within the meaning and scope of O 49 r 1(1) of the Rules of the High Court 1980.

Held, allowing the appeal with costs: The moneys in the hands of the intervener cannot constitute a debt due or accruing due to the judgment debtor until the fulfilment of the contingency, that is, until the certificate of fitness is produced.

Cases referred to

1 *Dunlop & Ranken Ltd* v *Hendall Steel Structures Ltd (Pitchers Ltd, Garnishees)* [1957] 3 All ER 344 (folld)

2 *Hongkong and Shanghai Banking Corporation* v *Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)* [1986] 2 MLJ 86 (folld)

Legislation referred to

Rules of the High Court 1980 O 49 r (1)

RD Rajasingam for the judgment creditors.
NV Kumar for the judgment debtor.
S Fernandez (*Pawan Chik bin Marican* with him) for the intervener.
YL Ng for the garnishee.

Cur Adv Vult

LC Vohrah J: This is an appeal by the intervener against the decision of the learned senior assistant registrar ordering that certain moneys held by the garnishee as stakeholder remain garnished until further inquiry to satisfy a judgment recovered against the judgment debtor by the judgment creditors.

The facts of the case in so far as they are relevant to this appeal are as follows. The intervener as the financier for a housing project developed by the judgment debtor provided two types of loan – known in commercial parlance as 'bridging loan' and 'end-financing', the former to the judgment debtor and the latter to the individual purchasers of the units in the housing project. The sums available by way of end-financing were released progressively to the judgment debtor by the intervener on the basis of certificates of completion issued by the architect for the housing project. All payments made by way of end-financing were channelled to the judgment debtor through the garnishee. It is stipulated in the sale and purchase agreement between the judgment debtor and the purchaser that the final instalment amounting to 5% of the purchase price is to be retained by the garnishee as stakeholder until the issuance of the certificate of fitness. The judgment creditors' units were completed in 1982 but certificates of fitness have still not been issued by the authorities in respect of these units. By an exchange of letters in 1983 (see exhibits WAZ-9 and WAZ-10, encl 40), the judgment debtor and the intervener, with notice to the garnishee, confirmed what purported to be an assignment whereby all the moneys comprising the final 5% instalment payment of the purchase price which had been forwarded to the garnishee were to be held by the garnishee as stakeholder on its undertaking as a firm of solicitors to remit these sums back to the intervener upon issuance of the relevant certificates of fitness towards reduction of the judgment debtor's account with the intervener. This assignment was effected two years before the judgment creditors obtained their judgment against the judgment debtor.

The sole issue for determination in this appeal is whether there is a debt due or accruing due to the judgment debtor from the garnishee within the meaning and scope of O 49 r 1(1) of the Rules of the High Court 1980 which reads:

> 1(1) *Where a person* (in this Order referred to as 'the judgment creditor') *has obtained a judgment or order for the payment by some other person* (in this Order referred to as 'the judgment debtor') *of money*, not being a judgment or order for the payment of money into court, *and any other person within the jurisdiction* (in this Order referred to as 'the garnishee') *is indebted to the judgment debtor, the court may, subject to the provisions of this Order and of any written law, order the garnishee to* pay the judgment creditor the amount of any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings. (emphasis provided)

The main ground of appeal relied upon by counsel for the intervener is that because the moneys comprising the final 5% instalment payment become payable to the judgment debtor upon some contingency, namely, the issuance of the certificate of fitness, these moneys are not attachable as they do not constitute a debt due or accruing due to the judgment debtor. In support of the contention, he referred to two authorities, *Dunlop & Ranken Ltd* v *Hendall Steel Structures Ltd (Pitcher Ltd, Garnishees)*[1] and *Hongkong and Shanghai Banking Corporation* v *Goh Su Liat (Telecommunication Authority of Singapore, Garnishee)*.[2] In the former case, according to the headnote, judgment creditors of sub-contractors, nominated under cl 21 of the conditions of a building contract in the RIBA form, obtained a garnishee order against the principal contractors under the building contract. Under cl 21 of the contract, no payment was due to a sub-contractor until receipt of the architect's certificate under cl 24. The order for steelwork given by the principal contractors to the sub-contractors included a condition that payment was to be made 'in accordance with the certificates and the times provided in the building contract'. When the garnishee order was made, one final certificate had not been issued by the architect and under it, when issued, some payment to the sub-contractors would be directed. On appeal against the garnishee order, it was held that until the architect's certificate had been given there was no debt due to the sub-contractors and, as the certificate had not been given when the garnishee order was made, the order should not have been made and accordingly the appeal was allowed. In the latter case, the judgment debtor was employed as a senior operator-in-charge with the Telecommunication Authority of Singapore (the garnishee). In June 1985, the judgment creditors commenced an action against the judgment debtor for the sum of $14,102.88 and interest, being the sum due on the judgment debtor's Master Card and Visa Card accounts with the judgment creditors. Judgment in default of appearance was entered against the judgment debtor for the sum claimed, interest and costs on 29 July 1985. The judgment creditors applied ex parte by summons for and obtained on 6 September 1985 a garnishee order calling upon the garnishee to show cause and the garnishee was required to attend before the assistant registrar on 27 September 1985. On 4 October 1985, the hearing day, only the judgment creditors appeared whereupon the assistant registrar made a garnishee order absolute against the garnishee ordering the garnishee to pay forthwith to the judgment creditors the sum of $967.70 being the judgment debtor's net salary for the month. The judgment debtor appealed against the orders of the assistant registrar given on 6 September 1985 and 4 October 1985. In allowing the appeal of the judgment debtor, Chua J had this to say (at p 87):

> There is no dispute that the judgment debtor's October salary was not due until 31 October 1985. So at the date of the garnishee order absolute, 4 October 1985, there was no attachable debt. Even an existing right under which something is accrued which will probably become a debt at some future date is not sufficient notwithstanding that the amount to become due is capable of being calculated with precision (17 *Halsbury's Laws of England*, para 527).

In my view, to arrive at a proper determination of the issue that has been posed, consideration must be given to the relevant provisions of the sale and purchase agreement appearing in the first schedule relating to the final 5% instalment payment which read:

> a sum equivalent to 5% of the purchase price which shall be paid to the vendor's solicitors ... as stakeholder *for payment of the vendor on production of the certificate of fitness for occupation* if any to the said building. (emphasis provided)

It is not in dispute that a certificate of fitness is required and that it has not been issued. On the authority of the two cases which have been cited, I am of the view that the moneys in the hands of the intervener cannot constitute a debt due or accruing due to the judgment debtor until the fulfilment of the contingency, that is until the certificate of fitness is produced.

Counsel for the judgment creditors has submitted that because the moneys that are in the hands of the garnishee have been released to the garnishee on the basis of certificates of completion issued by the architect, the judgment creditors thereby 'are obliged to pay' the judgment debtor and that accordingly their debt to the judgment debtor has accrued but that payment thereof has been stayed until the production of the certificates of fitness. I do not agree. The judgment creditors are bound by the terms of the sale and purchase agreement and the language of the relevant provisions, supra, clearly indicate that the judgment debtor is entitled to payment of the moneys only upon production of the certificates of fitness and until this condition is met, I cannot see how the moneys can be said to be due or accruing due to the judgment debtor.

In view of my finding on the main ground of the intervener's appeal, I do not consider it necessary to deal with the other subsidiary grounds that were relied upon by counsel for the intervener. In the result, this appeal is allowed with costs.

Appeal allowed.

Solicitors: *Lewis & Co*; *Albar Zulkifly & Yap*; *Wan-Marican & Hamzah.*

Reported by *Wong Kim Fatt*

R & I Securities Sdn Bhd v Syarikat Tanaman dan Perusahaan Perak Sdn Bhd

HIGH COURT (JOHORE BAHRU) – CIVIL SUIT NO 277 OF 1979
LC VOHRAH J
5 MAY 1988

Land Law – Private caveat – Extension by ex parte originating summons – Application to discharge order by summons-in-chambers – Objection – Whether caveat should remain – Limitation – National Land Code 1965, s 323(1)

This is an application by the defendant by way of summons-in-chambers to discharge an order granted on 16 December 1981 in originating summons no 371 of 1981 extending a private caveat entered on 24 December 1975 in respect of a piece of land lot no 1165 in the state of Perak ('the said land') until the final disposal of the suit or its earlier withdrawal by the plaintiff.

The plaintiff was a stockbroker and it obtained a resolution from the defendant to create a charge over the said land. This charge could not be and was never registered because the consent of the first chargee, United National Finance Bhd, could not be obtained and also because prior approval for the creation of the charge had not been obtained from the Mentri Besar of Perak. The plaintiff arranged to sell certain shares in Mosbert Bhd to Patel Holdings Sdn Bhd which in turn was to sell them to Hong Kong Securities Ltd. As the shares were not taken up by Hong Kong Securities Ltd, Patel Holdings Sdn Bhd sued the plaintiff in Penang, whereupon the plaintiff entered the said caveat to protect itself. The sole question for decision is whether the plaintiff's interest in the said land is of such a nature as to entitle it to caveat it under the provisions of s 323(1) of the National Land Code 1965.

Held, allowing the application: (1) The order extending the caveat must be discharged and the caveat should be removed. Limitation has set in to bar the plaintiff from enforcing any rights, legal or equitable, under the agreement to create the charge.

(2) Costs of this application to be paid by the plaintiff in any event.

Cases referred to

1 *Eng Mee Yong & Ors* v *Letchumanan* [1979] 2 MLJ 212 (refd)
2 *Inter-Continental Mining Co Sdn Bhd* v *Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145 (refd)
3 *Krishna Kumar* v *United Malayan Banking Corporation Bhd* [1983] 1 MLJ 106 (refd)

Legislation referred to

National Land Code 1965 s 323(1)

Al Raj for the defendant/applicant.
Upali Masacorale for the plaintiff/respondent.

Cur Adv Vult

LC Vohrah J: This is an application on the part of the defendant by way of a summons-in-chambers to discharge an order granted on 16 December 1981 in originating summons no 371 of 1981 extending a caveat lodged on 24 December 1975 in respect of land held under HS (D) LP 36/73 for lot no 11665 containing an area of 5024.7403 acres in the mukim of Durian Sebatang, district of Hilir Perak, in the state of Perak ('the said land') until the final disposal of this suit or its earlier withdrawal by the plaintiff.

The brief facts forming the background of this application are as follows. The plaintiff carried on business as a stockbroker at no 65, Jalan Tan Hiok Nee, Johor Bahru. The defendant at the relevant time was a company wholly owned by Mosbert Bhd whose directors were also the directors of the defendant and it carried on business next door to the plaintiff's business premises at no 66. An arrangement was entered into whereby the plaintiff was to sell shares in Mosbert Bhd to Patel Holdings Sdn Bhd which in turn was to sell the shares at an enhanced price to a company purportedly registered in Hong Kong known as Hong Kong Securities Ltd. Pursuant to this arrangement, the plaintiff on 27 May 1975 sold 1,100,000 shares in Mosbert Bhd to Patel Holdings Sdn Bhd at a price of $699,188 which sum Patel Holdings Sdn Bhd paid in full. On 28 May 1975, Patel Holdings Sdn Bhd sold to the plaintiff the same shares at the enhanced price of $752,735, delivery to be made on 28 August 1975. This delivery date was subsequently deferred to 28 November 1975. In order to secure the repurchase by Hong Kong Securities Ltd before the deadline, the plaintiff sought and obtained a resolution from the defendant to create a charge (see exhibit 1D1, encl 16) which resolution was conveyed in the defendant's undated letter to United National Finance Bhd, the first chargee, for the purpose of obtaining the release by the first chargee of the issue document of title to the appropriate land registry in contemplation of the registration of the second charge (see exhibit 1D2, encl 16). A charge instrument was apparently drawn up by the defendant in favour of the plaintiff in respect of the said land (see exhibit WCK3, encl 12) but it could not be or was never registered because the consent of the first chargee could not be obtained and also because of the restriction in interest requiring the prior approval of the Mentri Besar of Perak for the creation of a charge which approval had not been obtained. As Hong Kong Securities Ltd did not take up the shares, Patel Holdings Sdn Bhd filed an action against the plaintiff in Penang civil